F. M. S. REPORTS

[APPELLATE CRIMINAL JURISDICTION]

THOMAS, C.J.

February 1, 1935.

LEE CHIN KEE.....**Appellant**

v.

PUBLIC PROSECUTOR.....**Respondent**

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL APPEAL No. 1 of 1935]

The Criminal Procedure Code, 1926, section 419 — Duplicity of charges — Irregularity — The Customs Enactment, 1923, section 111(f)—Guilty knowledge deduced from conduct of accused.

Duplicity of charges is an irregularity not an illegality and is cured under section 419 of the Criminal Procedure Code, 1926, provided that such irregularity has occasioned no failure of justice.

The knowledge of a person charged with an offence under section 111 (f) of the Customs Enactment, 1923, can generally only be deduced from his conduct but the conduct of the defence may also be considered.

E. Jeff for the appellant.

Ma'arof bin Haji Zakariah, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

SIR SAMUEL THOMAS, C.J.—The appellant, Lee Chin Kee, was convicted of an offence under section 111(f) of the Customs Enactment, 1923. That section reads as follows:—

> "Whoever is in any way knowingly concerned in conveying, removing, depositing, concealing or dealing with any prohibited or restricted or uncustomed goods or any goods that have been illegally removed, with intent to defraud the Government of any duties thereon or to evade any prohibition or restriction of or applicable to such goods;.....shall in each and every of the foregoing cases be on conviction liable to a fine.....etc.,"

The charge against the appellant was:—

> "That you Lee Chin Kee, at or about 8 a.m. on 21.10.34 at the back of Paul Street, Seremban, near Straits Trading Company's office, were knowingly concerned in conveying or dealing in uncustomed goods to wit, 3 sacks of tobacco, an offence under section 111(f) of Enactment 6 of 1923 and punishable under same."

It will thus be seen that two offences have been included in the same charge, viz. (1) conveying and (2) dealing. A count so drafted would in England be bad for duplicity. See *R.* v. *Disney*, 24 Cr. App. R. 49 and *R.* v. *Wilmot*, 24 Cr. App. R. 63.

Section 419 of the Criminal Procedure Code provides that:—

> "Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint.....unless that error, omission.....irregularity..... had occasioned a failure of justice."

In *Sohoni's* Code of Criminal Procedure 12th edition 1927, page 1145 in the notes to section 537 of the Indian Code of Criminal Procedure corresponding to section 419 here, I find the following note—"when the defect is one of duplicity and not misjoinder this section may be applied." A reference is made to the notes at page 565 of the same work, and the cases there collected would seem to bear out the statement which I have already cited. In other words duplicity is an irregularity and not an illegality; it may therefore be cured under section 419. I am satisfied that in the present appeal the irregularity in question has occasioned no failure of justice.

The next point taken for the appellant was that a statement made by the appellant to a customs officer had been wrongly admitted. This question was dealt with in the case of *Rasiah* v. *Public Prosecutor*, (1931—1932) F.M.S.L.R. 45 and it was there decided that such a statement was admissible. Even if it were excluded I am satisfied that the note of the evidence is adequate for supporting the finding of the learned Magistrate.

It was next contended on behalf of the appellant that the word 'knowingly' used in the section in respect of which he has been convicted governs the whole clause, and although by section 100, the burden of proving that duty has been paid lies on the accused, yet, the burden of proving that the accused knew that duty had been paid still lies on the prosecution—see *Beh Ah Teng* v. *Public Prosecutor*, (1931—1932) F.M.S. L.R. 92.

The knowledge of a person charged with an offence of this nature can generally only be deduced from his conduct. In the present case the learned Magistrate has set out a number of grounds from which he deduces the guilty knowledge of the appellant. In addition to these grounds the conduct of the defence might be considered. Two out-door-officers had sworn to seeing the accused assisting to load the sacks which contained the uncustomed goods in question. A rickshaw puller also connected the accused with these sacks. The appellant would have the Court to believe that he had nothing to do with the sacks or the rickshaw puller. It would seem that the only possible object of denying such weighty evidence against him was due to his knowledge of the nature of the contents of the sacks, viz., that they were uncustomed goods. I am satisfied that the learned Magistrate was entitled to deduce therefrom that the appellant did know that duty had not been paid.

With regard to the punishment. This is fixed by section 111 as

> "a fine not less than three times the combined value of such goods and duty or $5,000 whichever is the less, and which may amount to twenty times the combined value of such goods and duty."

The total value and duty were stated to be $322.90, and the learned Magistrate inflicted a fine of $1,000. The slight increase would indicate merely a desire to make the fine a round figure.

I am now informed that the correct figures are $235.16 in respect of total value and duty, and

three times that amount would be $705.48. I understand that these corrected figures were accepted by the learned counsel appearing for the Public Prosecutor. The fine imposed by the learned Magistrate is accordingly reduced from $1,000 to $710.

In the event of the fine not being paid the learned Magistrate has imposed a sentence of six months simple imprisonment. It has been suggested that the period should be reduced on account of the appellant being only eighteen years of age. No doubt the learned Magistrate has considered this matter. In my opinion the offence is one of gravity, and I see no reason to interfere with this part of the sentence which the learned Magistrate has seen fit to impose.

Therefore the conviction is confirmed but the sentence is varied to a fine of $710 or six calendar months simple imprisonment.

Conviction Confirmed. Sentence Varied.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C. J.

February 26, 1935.

GAN KHOR .....**Plaintiff.**

v.

SOAN BIN PELITA .....**Defendant.**

[SELANGOR CIVIL SUIT No. 235 of 1934]

The Malay Reservations Enactment, 1913, section 8—Entry into possession of lands in Malay Reservation by chargee under power of attorney from chargor—The Land Code, 1926, Part X.

When the chargee of land in a Malay Reservation enters into possession of such land under a power of attorney executed by the chargor, he is not entitled to remain in possession when such power has been revoked, even though the charge has not been satisfied.

There is no such thing as a mortgage of land known to the law of the Federated Malay States, and apart from the express powers contained in the Land Code, 1926, a chargee has no right to enter into occupation of the land charged to him.

S. M. Yong for the plaintiff.

G. W. de Silva for the defendant.

Cur. adv. vult.

SIR SAMUEL THOMAS. C.J.—Gan Khor, the plaintiff in this suit, in the year 1927 arranged to purchase from the defendant, Soan bin Pelita, certain pieces of land comprised in E.M.R. 3203, 3204, 3205, and 3339 in the mukim of Ulu Yam in the district of Ulu Selangor. It was, however, noticed that inasmuch as the land was in a Malay reservation and that the defendant was a Malay, but the plaintiff was not, such a sale could not be effected owing to the provisions of the Malay Reservations Enactment, 1913. So a charge was executed on the 20th of April 1927 and thereby the defendant charged all the pieces of land which it had been proposed to sell. The consideration was stated to be $7,000. Interest was payable at the rate of 24 per cent per annum by equal monthly instalments of $140. The principal sum was repayable on the 20th of April, 1932.

Shortly after the execution of the charge the defendant gave the plaintiff a power of attorney. Clause 12 of the power of attorney gave the plaintiff right to enter into possession of all the lands of the defendant. Clause 18 gave the right to apply for and receive from any Government officer the quarterly allowance granted to the defendant in respect of the lands comprised in E.M.R. Nos. 3203, 3204, 3205 and 3339, and for that purpose to sign any instruments necessary. Clause 19 limited the power of attorney to those pieces of land. There was nothing in the power of attorney to say that it was irrevocable. It was in fact revoked. This is admitted in paragraph 4 of the statement of plaint. Paragraph 4 of the defence gives the date of revocation as the 18th of July, 1934.

After the charge had been executed, the plaintiff went into occupation and has remained in occupation ever since. The lands are planted with rubber. The coupons in respect of the sale of rubber were received by the plaintiff during the former period of restriction. In 1934 the Rubber Regulation Enactment came into force. Since the revocation of the power of attorney the defendant has refused to hand over the coupons in respect of the sale of rubber, and in consequence the plaintiff has been unable to dispose of a quantity of rubber collected.

These facts are not disputed, save that the defendant says that at the time the charge was executed, only a sum of $3,400 was owing. This sum together with the interest calculated at $3,600, together making $7,000, was to be paid off in five years. In view of the clear statement of the transaction contained in the charge I am unable to accept the defendant's attempt to vary the terms of a written document which is not supported by any independent evidence. The defendant complains that the plaintiff has not provided him with accounts, and that it was in consequence of that failure that the power of attorney was revoked.

At the hearing of the suit it was considered advisable that an opportunity should be given to the parties to come to some arrangement. At that time the defendant was not represented by counsel. There was further adjournment. Eventually the parties were not able to arrive at any agreement, and when the case came on again for hearing, the defendant was represented by Mr. de Silva.

I have thought it advisable in this judgment to set out the facts of the case before stating what exactly it is that the plaintiff claims. According to the prayer in the statement of plaint the plaintiff claims:—

(a) A declaration that the plaintiff is entitled to be in occupation of the lands held under E.M.R. 3203, 3204, 3205, and 3339 in the Mukim of Ulu Yam until such time as the debt secured by charge registered J. No. 430 27, charge 68 27, Ulu Selangor, is discharged.

(b) An order that the defendant be ordered to hand over to the plaintiff all the